No. 80-745

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ORIENTAL STEAMSHIP CORPORATION,
Petitioner,

v.

WILLIAM V. McMICHAEL,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should certiorari to the Ninth Circuit be granted in a longshoreman's personal injury case where the shipowner-petitioner failed to except to the trial court's instructions on negligence or having excepted failed to assign error brief or argue the court's instructions?

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Respondent prays that the court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case June 25, 1980, as to which rehearing was denied August 13, 1980.

COUNTERSTATEMENT OF THE CASE

Petitioner erroneously states that plaintiff, a longshoreman, is seeking

damages "in addition to his worker's compensation benefit". Plaintiff-respondent will be required to repay to the compensation carrier 100% of the funds paid to him or on his behalf ($35,483.76) without deduction for pro rata attorneys' fees or costs. Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980).

Admitted fact 3 of the Pretrial Order (TR 34) which was incorporated in a stipulation of fact and submitted to the jury as "Stipulation of Facts Exhibit 8" conclusively sets the factual background of respondent's (longshoreman) claim against petitioner (shipowner) for negligence resulting in severe personal injuries to respondent.

> On the evening of November 2, 1973, the M/V GOLDEN ROD was moored portside to Weyerhaeuser Dock in Tacoma on navigable waters of the United States. During the evening shift the longshoremen covered up the No. 2 and No. 3 hatches of the

> vessel. The defendant, following a common practice on vessels such as the GOLDEN ROD, required that the hatches be covered in the following manner: After the holds were filled with logs, the longshoremen put the pontoon hatch covers in place. They then laid out three tarpaulins on top of the pontoons. Next, they laid sheets of plywood on top of the tarpaulins. Finally, they laid cargo nets on top of the plywood. The purpose of laying the tarpaulins over the hatch covers is to prevent water from leaking into the holds. The purpose of laying the plywood and cargo nets over the tarpaulins is to protect the tarpaulins from damage, when the slings are pulled from the loads of logs placed on the hatches. Longshoremen commonly step from one hatch to another to finish laying out a tarpaulin, on log ships like the GOLDEN ROD. Plaintiff was injured while assisting in the placement of tarpaulins on the No. 2 cargo hatch when he fell in the well between No. 2 and No. 3 hatch and injured his right knee.

(Ex. 8, R. 34.)

Respondent alleged that the shipowner was negligent because the shipowner required the stevedore to use cargo netting on the hatches, when it knew or should have

known of the severe tripping hazard created. Respondent also alleged the shipowner was negligent in failing to provide adequate lights in the work area.

The petitioner denied negligence and alleged respondent was contributorily negligent.

At the conclusion of the respondent's case (TR 205 to 303), petitioner moved for a directed verdict (TR 303) asserting as it did on appeal to the Ninth Circuit that the shipowner's practice of requiring the placing of nets on the tarps was "customary"--"serves a valuable purpose" and "did not create an unreasonable risk of harm" as a matter of law (TR 303). Petitioner further argued that "the social value" of having the "ship stay alive against the possibility of a person tripping on that would be such that it does not create an unreasonable risk of harm."

The court denied the motion stating:

> I will deny the motion. I think it is a jury question. If it had been established this is the only way to do it, then there should be some question, but there is proof they could have done it another way.

(TR 304-5.)

At the conclusion of all the evidence (when viewed in the light most favorable to the respondent) the testimony was unanimous that the netting provided a severe tripping hazard; the evidence was in conflict on alternate safe methods available to the shipowner but there was no evidence to support respondent's assertions as to the overriding hazard to the vessel if the required net method were not used. The evidence was undisputed that lighting conditions were bad and it was the shipowner's responsibility to light the work area.

Petitioner rested and moved for a directed verdict (TR 367). Respondent

moved for a directed verdict on the issue of contributory negligence (TR 367). The court denied both motions on the ground that the testimony and exhibits established a jury question on the issue of negligence and contributory negligence (TR 367, 368).

Before excepting to the instructions, this colloquy took place:

> THE COURT: All right. Mr. Sullivan.
>
> I might say that in studying the instructions and the law, it seems to me that this case finally boils down to really an argument upon simple negligence, negligence in both aspects.
>
> MR. SULLIVAN (shipowner's lawyer): I believe the Court is correct in that viewpoint.
>
> THE COURT: All right.
>
> The Court then instructed on "simple negligence".

On appeal to the Ninth Circuit, petitioner-shipowner did not assign error to the court's instructions or the failure

to give any of respondent's requested instruction. Rather petitioner defined the issue presented to the Ninth Circuit as follows:

> The issue presented for review is whether there was evidence from which the jury could infer that the use of the netting created an unreasonable risk of harm to the longshoremen.
>
> The defendant charterer contends that the interest which society has in protecting a ship from leakage of water into its holds so far outweighs the interest society has in protecting a longshoreman against possible tripping, in these circumstances, that the court can say as a matter of law and should say that the use of the netting does not create an unreasonable risk of harm. The district court erred when it ruled that this was an issue which could only be decided by the jury. . . .

(Brief of appellant shipowner at 1, 2.)

The Ninth Circuit affirmed, citing Santos v. Scindia Steam Navigation, 598 F.2d 490 (9th Cir. 1979), cert. granted May 1980, but in its six-paragraph memorandum opinion did not address the issue of the

shipowner's failure to assign error to the trial court's instructions.

ARGUMENT AGAINST GRANTING CERTIORARI

If this case raised any legal issues in common with Santos v. Scindia Steam Navigation Co., supra, or any other longshore case for which certiorari now is pending, we would not oppose granting certiorari. However, nowhere in the appellate brief to the Ninth Circuit is there raised an issue concerning the standard of care or the definition of negligence under 33 U.S.C. § 905(b), or any other issue raised in Santos.

The standard of care and the definition of negligence under 33 U.S.C. § 905(b) was only addressed in the trial court by the court's instructions. In its brief to the Ninth Circuit, petitioner did not mention, let alone assign error to, brief or argue the trial court's instructions.

Neither did it assign error to brief or argue the trial court's refusal to give defendant's requested instructions. By this failure, petitioner has waived any objection to the court's instructions or refusal to give its proposed instructions; any argument based on the instructions or proposed instructions is deemed abandoned. E.g., Trailmobile v. Whirls, 331 U.S. 40, 50 (1947); Ortega Cabrera v. Municipality of Bayaman, 562 F.2d 91, 102 n.10 (1st Cir. 1977); United States ex rel. Greenhalgh v. F.D. Rich Co., 520 F.2d 886, 890 n.4 (9th Cir. 1975); Kletschka v. Driver, 411 F.2d 436, 446-7 (2d Cir. 1969); Smith v. American Guild of Variety Artists, 368 F.2d 511, 514 (8th Cir. 1966), cert. denied, 387 U.S. 931 (1967). The Supreme Court will not ordinarily consider an issue neither presented to nor considered by the court of appeals. E.g., United States v.

Lovasco, 431 U.S. 783, 789 n.7 (1977); Cort v. Ash, 422 U.S. 66, 72 n.6 (1975); United States v. Ortiz, 422 U.S. 891, 898 (1975); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-8 (1971); Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967).

The only issue raised in the trial court and before the court of appeals by respondent's motions for a directed verdict, for a new trial and for a judgment notwithstanding the verdict was whether or not there was sufficient evidence to sustain the verdict. Since petitioner has waived any objection to the trial court's instructions, the sufficiency of the evidence must be weighed against those instructions. The evidence adequately, if not overwhelmingly, supported the jury verdict. Of itself, the issue of the sufficiency of the evidence raises no important question of federal law.

In the present posture of this case, because of petitioner's failure to raise the issue of the standard of care before the court of appeals, this court's decision in Santos will have no effect on the determination in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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